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No. 99-69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JUDITH A. NEMETH, DONALD J. NEMETH, and JOHN L. VITALE

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 1990, the Florida Legislature enacted legislation that imposed a $295.00 impact fee "upon the initial application for registration pursuant to s. 320.06 of every motor vehicle classified in s. 320.08(2), (3), and (9)(c) and (d)." Chapter 90-132, Section 74, Laws of Florida, was codified as Section 320.072(1)(b), Florida Statutes (Supp.

1990), and took effect on July 1, 1990. Section 320.072(1)(b), Florida Statutes (Supp. 1990), was subsequently repealed and superseded by Section 319.231, Florida Statutes (1991).[1/] Between July 1, 1990 and June 30, 1991, an impact fee of $295.00 was imposed upon the person registering the vehicle.[2/]

Mr. and Ms. Nemeth are residents of Florida. Both purchased vehicles in New Jersey. Both moved to Florida in 1990. On November 24, 1990, both registered their vehicles in Port St. Lucie, St. Lucie County, Florida. At the time of registration, both were required to pay $295 for the impact fee imposed by Section 320.072(1)(b), Florida Statutes, (Supp. 1990). Both later sought a refund of the impact fee they paid. The date they sought the refund was the date they

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[1/] Section 319.231, Florida Statutes, (1991), was struck in 1994 by the Florida Supreme Court as being in violation of the Commerce Clause. Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994).

[2/] Section 319.231, Florida Statutes (1991), imposed a $295.00 impact fee upon the initial "titling" of a motor vehicle, as opposed to Section 320.072(1)(b)'s imposition on "registration."

filed the suit in the Florida Circuit Court on October 4, 1994. They did not allege in the Complaint that they ever filed an application for a refund for the $295 impact fee with the Florida Department of Highway Safety and Motor Vehicles (DHSMV), or were denied a refund request, as required by Section 215.26, Florida Statutes.

During 1990, Mr. John L. Vitale moved from New York to Florida, and he registered his vehicle on January 7, 1991 in Port St. Lucie, St. Lucie County, Florida. He was required to pay all regularly required fees to title and register a vehicle imposed by Chapters 319 and 320, Florida Statutes, including the $295 impact fee imposed by Section 320.072(1)(b), Florida Statutes (Supp. 1990). Mr. Vitale paid the impact fee on January 7, 1991, and later sought a refund of the impact fee he paid. The date he sought the refund was the date he filed the suit in the Florida Circuit Court on October 4, 1994. Mr. Vitale did not allege that he ever filed an application for a refund for the $295 impact fee with the DHSMV or that he was denied a refund request, as required by Section 215.26, Florida Statutes.

The action was filed in the Circuit Court for the 19th Judicial Circuit, in and for St. Lucie County, Florida, on

October 4, 1994. Petitioners challenged the constitutionality of Section 320.072(1)(b), Florida Statutes (Supp. 1990), alleging that Section 320.072(1)(b), Florida Statutes (Supp. 1990), was in violation of the Commerce Clause, and infringed upon the right to travel.

Respondents responded to the Petitioners' complaint by filing a motion to dismiss. Respondents' motion was two-fold. First, the Respondents asserted that the Petitioners had not filed a written refund request with the Florida Comptroller as required by Section 215.26, Florida Statutes. Secondly, the Respondents asserted that the Petitioners did not file a refund application within the three (3) year time period from paying the fee or tax and were thus time barred from seeking any refund by Section 215.26(2), Florida Statutes.

A hearing was held on the Respondents' motion with the Circuit Court granting Respondents' motion and dismissing the action. However, the court allowed Petitioners the opportunity to file an amended complaint within ten (10) days of the Order.

Petitioners filed an amended complaint. The Petitioners asserted in their amended complaint that, in

addition to the same challenge raised in the first complaint, Section 215.26, Florida Statutes, was unconstitutional; that it was beyond the power of the Legislature to pass; that it denied Petitioners access to the courts; and, that it denied the Petitioners equal protection. In the Amended Complaint, Petitioners alleged they had no "predeprivational hearing" opportunity to challenge Section 320.072(1)(b), Florida Statutes (Supp. 1990), before paying the impact fee. Petitioners did **not** allege any additional or different facts from the original complaint.

Respondents again filed a motion to dismiss the amended complaint. The Circuit Court again granted the Respondents' motion to dismiss. Having not alleged that any action was taken by any of the Petitioners within three (3) years of paying the impact fee, the Circuit Court ruled that the Petitioners were timed barred from seeking a refund. The Petitioners appealed the decision of the Circuit Court to Florida's Fourth District Court of Appeal.

After appeal, but before the decision of the Fourth District Court of Appeal, Petitioners sought redress from the Florida Legislature in the form of a claims bill, pursuant to Section 11.065, Florida Statutes. That claims bill authorized

the refund of the impact fee for those who paid it pursuant to Section 320.072(1)(b), Florida Statutes (Supp. 1990). The Florida Legislature, in 1996, passed the requested claims bill. See Chapter 96-243, Laws of Fla. (1996). That act became law on May 28, 1996, and was in effect until May 28, 1997.

On January 22, 1997, the Fourth District Court of Appeal reversed the decision of the circuit court. Nemeth v. Department of Revenue, 686 So. 2d 778 (Fla. 4th DCA 1997). The Fourth District ruled that the Supreme Court of Florida's decision in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), had overruled its earlier decision in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). In so holding, the District Court negated any requirement to file a refund claim under Section 215.26, Florida Statutes, or to file such a claim with 3 years of the date of payment as required by Section 215.26(2), Florida Statutes. However, to clarify the matter the District Court certified the following question to the Supreme Court of Florida as one of great public importance:

> WHETHER DEPARTMENT OF REVENUE V. KUHNLEIN, 646 So. 2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM STATE EX REL. VICTOR CHEMICAL WORKS V. GAY, 74 So. 2d 560 (Fla. 1954) TO THE

EXTENT THAT VICTOR CHEMICAL HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

The State sought review of this certified question, which was granted.

On April 8, 1999, the Supreme Court of Florida decided the case of Department of Revenue v. Nemeth, __ So. 2d __, 24 Fla. L. Weekly S160 (Fla. 1999) (Pet. App. 1-11), clearing up the confusion left by the Kuhnlein decision. The Supreme Court knew it had before it a class action suit, brought by the Petitioners, in which none of the Petitioners or other potential member of the class had yet filed a written refund claim pursuant to Section 215.26, Florida Statutes. Furthermore, all of the persons who had ever paid the fee under Section 320.072(1)(b), Florida Statutes (Supp. 1990), including the Petitioners, were jurisdictionally barred from seeking a refund, pursuant to Section 215.26, Florida Statutes.

The Supreme Court of Florida specifically addressed two issues in its decision. First, that Court reexamined the procedures to seek a refund of taxes paid, who had to comply

with those procedures, and under what circumstances. Second, the Supreme Court examined the time period in which a refund application had to be filed, an examination in detail that had not been done since 1954 in Victor Chemical.

While the Court upheld the vast majority of Section 215.26, Florida Statutes, as written, the Court did expressly hold that it had earlier reinterpreted Section 215.26, to allow a limited exception to the exact compliance with the legislative provisions of Section 215.26, Florida Statutes, as discussed in Victor Chemical some 45 years ago. The exception, emanating from Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), allowed for the "direct filing" of a tax refund case under very specific circumstances. This decision was based upon the Court's interpretation of Florida law.

The Supreme Court of Florida set out two necessary conditions that must be present before its direct-file exception could be utilized; the first that the tax itself must be challenged as unconstitutional and the second that the tax must have been paid "involuntarily" as opposed to a voluntary payment. Thus, **both** conditions or circumstance **must** be present before a taxpayer could utilize the "direct

file" exception.

Next, the Supreme Court of Florida examined the issue of the time limitations in which to file such a tax refund lawsuit, under Section 215.26, Florida Statutes, or the "direct-file" exception. It is that part of the Nemeth decision that is at question here.

The issue before the Supreme Court was whether the time limits of Section 215.26(2), Florida Statutes, had been suspended or negated by the prior Kuhnlein decision. The Court first recognized that the issue had not been addressed in Kuhnlein. See, Pet. App. 5-7.

The question of a timely filing is one of the primary issues raised by the Petitioners. The Supreme Court of Florida resolved the confusion by stating that a taxpayer suit under the exception

> must be commenced by filing in the appropriate court within the time requirements set forth in section 215.26(2), that is, "within 3 years after the right to refund has accrued."

Pet. App. 7-8. The Supreme Court then clarified the Kuhnlein decision by stating:

> Our holding in Kuhnlein **did not eliminate the need to comply** with the time requirements in section 215.26. Instead, we merely found that meeting the administrative requirements of

> section 215.26 was unnecessary. 646 So. 2d at 720. (e.s.)

Pet. App. 8.

The Supreme Court concluded its ruling on timely compliance by stating

> Therefore, we now explicitly hold that a plaintiff challenging the constitutionality of a tax statute and seeking a refund, while not required to file with the Comptroller, must still file suit within three years of payment as required by section 215.26(2).

Pet. App. 8.

In conclusion, after Nemeth, only a "facial" constitutional challenge to the tax itself, when the tax was involuntarily paid, may be brought directly in a circuit court. Even then, the taxpayer

> while not required to file with the Comptroller, must still file suit within three years of payment as required by section 215.26(2).

Pet. App. 8.

Though not necessary to the determination of the certified question before it or an interpretation of Section 215.26, Florida Statutes, the Supreme Court of Florida also addressed the due process aspects of the post-deprivational procedures and time limits in Florida's refund statute. The Court determined Florida's refund law met this Court's

mandate of providing a meaningful backward-looking relief or a clear and certain remedy, as announced in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) (McKesson), by stating:

> We find that section 215.26 provides adequate post-deprivation relief so as to comport with federal due process standards. We reach this conclusion primarily because McKesson refers to section 215.26 as an example of a statute that imposes permissible procedural requirements on post-deprivation relief. 496 U.S. at 45 n.28; see also Newsweek, Inc. v. Florida Department of Revenue, 118 S. Ct. 904, 905 (1998) (noting that Court has interpreted section 215.26 as providing "a postpayment remedy").

Pet. App. 9. Finally, the Supreme Court stated "we believe that Florida, as evidenced by our decision in Kuhnlein, not only satisfies McKesson's due process requirements but indeed provides broader post-deprivation relief to taxpayers who meet the requirements outlined above." Pet. App. 10.

REASONS FOR DENYING THE WRIT

There are two reasons for denying the writ. The first reason is that during the pendency of the action in the Florida court system, the Petitioners went to the Florida Legislature and secured, under Florida law, a claims bill that provided to the Petitioners all of the relief they sought in this litigation, a full refund of their $295 impact fee.

The second reason is that the decision of the Supreme Court of Florida below was based strictly upon state law matters, adequate and independent of any federal ground. The Supreme Court of Florida based its decision primarily upon a clear reading of the time limitations for filing a request for a refund, contained in Florida's refund statute, Section 215.26, Florida Statutes. Petitioners failed to meet the statutory requirements of Section 215.26, Florida Statutes, by failing to timely request a refund. Stated simply, the Petitioners did not timely file a refund application, pursuant to Section 215.26, Florida Statutes. The Petitioners' suit was properly dismissed by the Circuit Court and subsequently affirmed by the Supreme Court of Florida. The decision below was not grounded in federal law.

I. PETITIONERS HAVE ALREADY RECEIVED THE RELIEF THEY SOUGHT

The first reason for denying the writ is that during the pendency of the action in the Florida court system, the Petitioners went to the Florida Legislature and secured, under Florida law, a claims bill that provided to the Petitioners all of the relief they sought in this litigation.

It was disclosed by the Petitioners at oral argument

before the Florida Supreme Court that the Petitioners had received refunds of their $295 impact fee. After appeal, but before the decision of the Fourth District Court of Appeal, Petitioners sought redress from the Florida Legislature in the form of a claims bill, pursuant to Section 11.065, Florida Statutes. That claims bill authorized the refund of the impact fee for those who paid it pursuant to Section 320.072(1)(b), Florida Statutes (Supp. 1990). The Florida Legislature, in 1996, passed the requested claims bill. See Chapter 96-243, Laws of Fla. (1996). That act became law on May 28, 1996, and was in effect until May 28, 1997.

The receipt of the refunds by all of the class members was as a result of a legislative claims bill. In the claims bill itself, the legislature directed the Department of Motor Vehicles and Highway Safety to establish a refund program for taxes paid pursuant to section 320.072(1)(b), Florida Statutes (Supp. 1990), between July 1, 1990 and June 30, 1991. See, Chapter 96-243, Section 1, Laws of Fla. (1996). The Supreme Court noted this fact in its decision. See, Pet. App. 7, n.5.

Because the Petitioners have received all the relief they have ever sought, there is no need for this Court to

review the matter further. See, Powell v. McCormack, 395 U.S. 486, 495-501 (1969) (A case is considered moot when issues presented are no longer "live" or parties lack legal cognizable interest in outcome.)

II. THIS CASE WAS DECIDED SOLELY ON MATTERS OF STATE LAW

It is axiomatic that this Court has no jurisdiction when the decision sought to be reviewed has been decided on state law. This Court has long held that where the decision below rests upon an adequate and independent state ground, this Court will deny review of the matter. See, e.g., Lambrix v. Singletary, 520 U.S. 518 (1997); Coleman v. Thompson, 501 U.S. 722 (1991). As this Court just recently stated in Lambrix:

> In Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553, 115 L.Ed.2d 640 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court [520 U.S. 523] rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038, 1042-1043, 103 L.Ed.2d 308 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65

> S.Ct. 459, 462-464, 89 L.Ed. 789 (1945); see also Sochor v. Florida, 504 U.S. 527, 533-534, and n. *, 112 S.Ct. 2114, 2119-2120, and n. *, 119 L.Ed.2d 326 (1992).

Lambrix v. Singletary, 520 U.S., at 522-523.

For this Court to have jurisdiction the case below must first have decided a question of federal law and that the state ground is not independent of the federal question. Arizona v. Evans, 514 U.S. 1 (1997); Ohio v. Robinette, 519 U.S. 33 (1996). The test to make that determination was established in Michigan v. Long, 463 U.S. 1032 (1983). This Court held when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id., 463 U.S. at 1040-1041,

The decision below is one that rests upon an adequate and independent state ground. The Supreme Court of Florida based its entire decision on Florida law. The interpretation of Section 215.26, Florida Statutes, and its meaning was not

based on any federal constitutional provision or upon any federal law. The Florida Supreme Court below merely clarified the State's refund statute as to where and when a refund claim must be filed in order to preserve the claim.

There is no question that the Supreme Court of Florida did have a discussion in its opinion entitled "Federal Due Process Requirements." Pet. App. 9. However, this discussion was extraneous to the interpretation to Section 215.26, Florida Statutes, and is dicta. Had the Supreme Court of Florida left out this part of the opinion the decision would still have been the same. This discussion of federal law was neither material nor determinative of the issue before the Supreme Court of Florida.

This Court should refuse to consider the Petitioners' federal due process arguments.

CONCLUSION

The Department submits, for the foregoing arguments and authorities, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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